

Garside (Migration) [2022] AATA 3309 (17 August 2022)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr James Edward Garside
REPRESENTATIVE:	Mr Justin Browne (MARN: 1169631)
CASE NUMBER:	1926062
HOME AFFAIRS REFERENCE(S):	BCC2018/4551774
MEMBER:	K. Chapman
DATE:	17 August 2022
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal affirms the decision not to grant the applicant a GK – Temporary Skill Shortage (Class GK) visa.

Statement made on 17 August 2022 at 12:17pm

CATCHWORDS

MIGRATION – Temporary Skill Shortage (Class GK) visa – Subclass 482– applicant failed to provide requested information – applicant failed to meet Public Interest Criterion 4020 – applicant had failed to declare his criminal record – no compassionate or compelling circumstances – requirements of PIC 4020(1) should not be waived – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 65, 359, 360, 363
Migration Regulations 1994, Schedule 2, cl 482.217

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Hasran v MIAC [2010] FCAFC 40
Huo v Minister for Immigration and Multicultural Affairs [2002] FCA 617
Manna v Minister for Immigration and Citizenship [2012] FMCA 28

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 27 August 2019 to refuse to grant the applicant a GK – Temporary Skill Shortage (Class GK) visa under s.65 of the *Migration Act 1958* (Cth) ('the Act').
5. The applicant applied for the visa on 17 October 2018. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.482.217 of Schedule 2 to the *Migration Regulations 1994* (Cth) ('the Regulations'), because he did not satisfy Public Interest Criterion 4020 ('PIC 4020') and there were no compassionate or compelling circumstances to warrant waiver of this criterion. In particular, the delegate determined that the applicant had failed to declare his criminal record in the Subclass 482 visa application and in a previous application for a Subclass 457 visa.
6. On 17 September 2019, the applicant applied to the Tribunal for review of the visa refusal decision, providing a copy of that decision with his application. On 28 July 2022, the Tribunal wrote to the applicant pursuant to s.359(2) of the Act, inviting him to provide the following information:
 7. *"Information regarding whether you satisfy Public Interest Criterion 4020 or whether there are compelling or compassionate circumstances which justify the granting of the visa and the waiver of the relevant requirements of that Criterion."*
8. The Tribunal is satisfied that this invitation was properly despatched to the email address of the applicant's representative. On 28 July 2022, the Tribunal received an automatic response indicating the representative was out of the office ill but would check his emails daily. The due date for response to the above invitation was 11 August 2022. At the time of this decision, no substantive response to the invitation has been received by the Tribunal.
9. Where an applicant is invited to provide further information in accordance with subsection 359(2) of the Act, and fails to do so within the prescribed period, the Tribunal may make a decision on the review without taking any further action to obtain the information according to subsection 359C(1) of the Act. In these circumstances, the applicant is not entitled to appear before the Tribunal in accordance with subsection 360(3) of the Act. Of note, the effect of s.363A of the Act is that if a review applicant has no entitlement to a hearing, the Tribunal has no power to permit the review applicant to appear before it, as outlined by the Full Federal Court in the matter of *Hasran v MIAC* [2010] FCAFC 40.
10. The Tribunal has carefully considered whether to afford additional time to the applicant to give the information requested in the s.359(2) invitation, or to provide further material in support of his application for review. In doing so, it has paid careful regard to the guidance in the decisions of *Huo v Minister for Immigration and Multicultural Affairs* [2002] FCA 617 and *Manna v Minister for Immigration and Citizenship* [2012] FMCA 28, where the Courts held that the Tribunal is not required to indefinitely defer its decision-making process.
11. The Tribunal has taken into account that the applicant has been aware since around 27 August 2019 of the reasons for the visa application being refused, and also that the implications of not providing the information requested in the invitation from the Tribunal of 28 July 2022 were set out in that correspondence. Additionally, the Tribunal notes that no

substantive contact has been made with it by the applicant or his representative since 17 September 2019.

12. In these circumstances, the Tribunal considers that the applicant has had sufficient time in which to give the information requested in the s.359(2) invitation and address the central issues arising in the application for review. On balance, the Tribunal considers it appropriate to make its decision on the review without taking any further action to obtain the information requested in this invitation. Accordingly, the Tribunal has made its decision on this review application having due regard to the documentary material before it.
13. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. The issue in this review is whether the applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.482.217 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
15. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

16. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no

requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

17. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
18. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
19. The Tribunal also notes the guidance concerning these matters from the Full Federal Court in the matter of *Singh v MIBP* [2018] FCAFC 52. In particular, the Tribunal has paid careful regard to the following guidance in that decision [at 144]:

20. "Where an issue of the proper construction or application of PIC 4020 is raised, Trivedi and Patel authoritatively state that where a visa applicant has given or caused to be given to a relevant decision-maker a document which is a "bogus document" as defined, or information that is false or misleading in a material particular as defined, to determine whether PIC 4020 is satisfied or not, it is not necessary to show knowing complicity by the visa applicant as long as the material is purposely untrue."

21. The applicant declared in his application for the Subclass 482 visa that he had not 'ever been convicted of an offence in any country (including any conviction which is now removed from official records)'. Similarly, he failed to declare any criminal convictions in his prior Subclass 457 visa application. The applicant held the Subclass 457 visa in the 12 months before the Subclass 482 application was made.
22. As noted in the applicant's submission to the Department of 25 March 2019, he has the following convictions in the United Kingdom:
 - a. Burglary and theft – 29 April 2000 – Warning
 - b. Attempt/Theft (Shoplifting) – 27 September 2001 – Reparation order
 - c. Being drunk and disorderly – 30 March 2004 – conditional discharge
 - d. Destroy or damage property (value unknown) – 13 January 2010 – community order 12 months
 - e. Destroy or damage property (value of damage 5000 pounds or less) – 13 January 2010 – community order 12 months
 - f. Use disorderly behaviour or threatening/abusive/insulting words – 13 January 2010 – community order 12 months
 - g. Destroy or damage property (value of damage 5000 pounds or less) – 15 February 2013 – dealt with by way of 200 pounds fine
 - h. Assault constable – 15 February 2013 – dealt with by way of 500 pounds fine
23. The applicant submitted to the Department that his failure to declare these convictions in his Australian visa applications was an oversight, caused by the mistaken belief he did not need to declare them as he was not imprisoned. The Tribunal has carefully examined the documentary evidence before it and is satisfied that the applicant possesses a criminal record in the United Kingdom. Further, the Tribunal is satisfied he did not declare this information in his Subclass 482 visa application, or the prior Subclass 457 visa application.

24. The Tribunal notes that it invited the applicant, pursuant to s.359(2) of the Act, to provide information regarding PIC 4020, however he failed to do so. On balance, the Tribunal is not persuaded by the applicant's excuse for his conduct given the uncomplicated nature of the questions asked of him in the relevant visa applications, in combination with his formative years being spent in the United Kingdom communicating in the English language. Rather, the Tribunal is satisfied that the applicant lied in the relevant visa applications.
25. Following careful consideration, the Tribunal finds there is probative evidence that the applicant has given to the Minister information that is false and misleading in a material particular in relation to his Subclass 482 visa application, and prior Subclass 457 visa application, specifically by falsely failing to declare his criminal convictions. Further, the Tribunal is satisfied that the aforementioned information contained in the visa applications is purposely untrue and its submission contains an element of deception.
26. The relevant information is false or misleading in a material particular, pertaining to both visa applications, as an assessment of character is required in these applications pursuant to PIC 4001. The Tribunal rejects assertions to the contrary made by a prior representative before the Department. This is because information derived through the visa applications regarding criminal antecedents is clearly relevant to an assessment of PIC 4001, which is a criterion pertinent to both visas.
27. Therefore, the Tribunal finds that the applicant does not satisfy PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

28. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
29. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
30. For the following reasons, the Tribunal is not satisfied that the requirements of PIC 4020(1) should be waived. There is no contemporary evidence before the Tribunal that there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen, that justify the granting of the Subclass 482 visa to the applicant.
31. Whilst the Tribunal notes the applicant put information before the Department regarding compassionate or compelling circumstances regarding his employer and a purported partner at the time, there is no contemporary evidence before the Tribunal regarding these matters. Of note, the Tribunal provided the applicant with the opportunity to provide such information in its correspondence of 28 July 2022, but he has not done so. Following careful consideration, the Tribunal finds that the requirements of PIC 4020(1) should not be waived.
32. On the basis of the above reasons, the applicant does not satisfy PIC 4020 for the purposes of cl.482.217.

DECISION

33. The Tribunal affirms the decision not to grant the applicant a GK – Temporary Skill Shortage (Class GK) visa.

K. Chapman
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...